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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 178

DAVIS FROZEN FOODS, INC., *Petitioner*

v.

NORFOLK SOUTHERN RAILWAY COMPANY, *Respondent*

PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Subject Index.

	Page
Introductory Prayer	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
Specification of Errors	7
Reasons for Granting the Writ	8
Conclusion	19
Appendix "A"—Opinion Below	20
Appendix "B"	23

Table of Cases Cited.

Angel v. *Bullington*, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832 ..... 12, 18
Angelo v. *Lamborn*, 2 F. 2d 855 15
Arnold v. *Trust Co.*, 48 N.C. 433, 67 A. D. 250 9
Bank & School Com., 121 N.C. 107, 28 S.E. 134 10
Cable v. *R. R.*, 122 N.C. 892, 29 S. E. 377 10
Caldwell v. *Wilson*, 121 N.C. 425, 28 S.E. 554 10
Capital Traction Co. v. *Hof*, 174 U.S. 1 ..... 13, 14
Cities Serv. Oil Co. v. *Dunlap*, 308 U.S. 208, 84 L. Ed. 196, 60 S. Ct. 201 ..... 12, 18
Clay County Cotton v. *Home Life Ins. Co.*, 113 F. 2d 856 17
Cohen v. *Beneficial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 122 ..... 12, 18
Collins v. *Swanson*, 121 N.C. 67, 28 S.E. 65 10
Cooper v. *Brown*, 126 F. 2d 874 17
Cox v. *R. R.*, 123 N. C. 604, 31 S. E. 848 9
County of Macon v. *Shores*, 97 U.S. 272 15

Page

Detroit Edison Co. v. *Knowles*, 152 F. 2d 422..... 17
Eller v. *Church*, 121 N.C. 269, 28 S.E. 364 10
Erie R. Co. v. *Tompkins*, 304 U.S. 64, L. Ed. 1188, 58 S. Ct. 817 .....7, 11, 13, 14, 16, 18, 19
Evans v. *Ins. Co.*, 213 N.C. 539, 196 S.E. 814 9
Everett v. *Receivers*, 121 N.C. 519, 27 S.E. 991..... 10
Fisher v. *Jackson*, 216 N.C. 302, 4 S.E. 2d 847 9
Gorham v. *Mutual Ben. Health & Accident Ass'n of Omaha*, 144 F. 2d 97, cert. denied, 312 U.S. 688..... 16
Guaranty Trust Co. v. *York*, 326 U.S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464, 160 ALR 1231.....12, 16, 18
Gulf, Mobile & Ohio R. Co. v. *Williamson*, 191 F. 2d 887 17
Gunning v. *Cooley*, 281 U.S. 90 15
Hardison v. *R.R.*, 120 N.C. 492, 26 S.E. 630 10
Haywood v. *Insurance Co.*, 218 N. C. 736, 12 S.E. 221 9
Herron v. *So. Pac. R. Co.*, 283 U.S. 91, 51 S. Ct. 383, 75 L. Ed. 857 .....13, 14, 17
House v. *R.R.*, 131 N.C. 103, 42 S.E. 533 9
In Re Will of Margaret Deyton, 177 N.C. 494, 99 S.E. 424 15
Johnson v. *R. R.*, 122 N.C. 955, 30 S.E. 127 10
Klaxton Co. v. *Stentor Elec. Co.*, 313 U.S. 487, 85 L. Ed. 1481, 61 S. Ct. 1023, 134 ALR 1462 .....12, 18
Laxton v. *Hatzel & Buehler, Inc.*, 142 F. 2d 913 17
Lennig v. *New York Life Ins. Co.*, 122 F. 2d 87..... 17
Lyon v. *Travelers Assn.*, 25 F. 2d 596 16
Marshall v. *Hubbard*, 117 U.S. 415 15
McCracken v. *Clark*, 235 N.C. 186, 69 S.E. 2d 184 7, 8, 17, 19
McSweeney v. *Prudential Ins. Co.*, 128 F. 2d 660, Cert. Denied, 317 U.S. 658 17
N. Jacobi Hardware Co. v. *Victor*, 11 F. 2d 30..... 16
Norfolk Southern Ry. Co. v. *Davis Frozen Foods, Inc.*, 4 Cir. 195 F. 2d 662 ..... 2, 4
North Penn R. Co. v. *Com. Nat. Bank*, 123 U.S. 727 15
Nudd v. *Barrows*, 91 U.S. 426 .....13, 14
Palmer v. *Hoffman*, 318 U.S. 109, 117 L. Ed. 645, 63 S. Ct. 477, 144 ALR 719 .....12, 18
Ragan v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 93 L. Ed. 1520, 69 S. Ct. 1233 18
Slocum v. *N. Y. Life Ins. Co.*, 228 U.S. 364 15
Spence v. *Bethlehem Steel Co.*, 173 Md. 539, 197 A. 302 19

Page

Spruill v. *Ins. Co.*, 120 N.C. 141, 27 S.E. 39 ..... 9, 10
Stoner v. *New York L. Ins. Co.*, 311 U.S. 464, 85 L. Ed. 284, 61 S. Ct. 336 ..... 12, 17
Swift v. *Tyson*, 16 Pet. 1, 18 L. Ed. 865 ..... 11, 14
United States v. *Grannis*, 172 F. 2d 507 16
Waldron v. *Aetna Cas. & Sur. Co.*, 141 F. 2d 230 17
West v. *American Tel. & Tel. Co.*, 311 U.S. 223, 61 S. Ct. 179, 85 L. Ed. 139 ..... 11, 12
Whitley v. *R. R.*, 122 N.C. 987, 29 S.E. 783 10
White v. *State of Md.*, 106 F. 2d 392 17
White v. *R. R.*, 121 N.C. 484, 27 S.E. 1002 10
Whitten v. *City of Haverhill*, 204 Mass. 95, 90 N.E. 409 19
Wittkowski v. *Wasson*, 71 N.C. 451 9
Woods v. *Interstate Realty Co.*, 337 U.S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524 ..... 12, 18
Yarn Mills v. *Armstrong*, 191 N.C. 125, 131 S.E. 416 9

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No.

DAVIS FROZEN FOODS, INC., *Petitioner*

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NORFOLK SOUTHERN RAILWAY COMPANY, *Respondent*

PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Davis Frozen Foods, Inc., a North Carolina corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on May 28, 1953.

OPINIONS BELOW

The District Judge did not render an opinion in either the first or second trial. The first opinion of the United States Court of Appeals for the Fourth Circuit filed April 1, 1952 is reported in *Norfolk Southern Ry. Co.* v. *Davis*

Frozen Foods, Inc., 4 Cir. 195 F. 2d 662, ~~in the record at page ——~~. The second opinion of the Court of Appeals for the Fourth Circuit was entered May 28, 1953, —F. 2d—, and is in the record page 2-14, and is made Appendix A to this petition.

JURISDICTION

The judgment of the United States Court of Appeals, Fourth Circuit, was entered on May 28, 1953. The jurisdiction of this Honorable Court is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Sections 1254, 1332 and 2101, together with Rule 38, Section 5 (b) of this Court.

QUESTION PRESENTED

Whether, in a diversity of citizenship case tried in North Carolina, the decision of the Court of Appeals, in affirming a directed verdict in favor of the plaintiff who had the burden of proof, which is strictly forbidden by the law of the State of North Carolina, creates a discrimination against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of Federal Courts, which discrimination is contrary to the decisions of the United States Supreme Court.

STATUTES INVOLVED

There are no State statutes involved, but the pertinent law is firmly decided by the highest Court of the State of North Carolina that a directed verdict in *favor* of the party having the burden of proof is forbidden. This is fully set forth under the section, Reason for Granting the Writ, of this petition.

STATEMENT OF THE CASE

This is a civil action for property damages which was first tried in the United States District Court for the Eastern District in the State of North Carolina at the September Term, 1951. Jurisdiction was based solely on diversity

of citizenship, the allegations of section 1 of the Norfolk Southern Railway Company's complaint, herein the respondent, being as follows:

> "1. That the plaintiff is a citizen of the State of Virginia, being a corporation incorporated under the laws of the State of Virginia. That the defendant, as the plaintiff is informed and believes, is a citizen of the State of North Carolina, being a corporation incorporated under the laws of the State of North Carolina. That the matter in controversy, exclusive of interest and costs, exceeds the sum of THREE THOUSAND ($3,000.00)." (Certified typewritten record, p. 2.)

The allegations of section 1 were admitted in defendant petitioners' answer. (Certified typewritten record, p. 5). The allegation of the complaint which is the basis of plaintiff's claim for damages, is as follows:

> "2. That on July 30, 1947, the defendant negligently drove a large and heavy motor truck along North Carolina Highway No. 581 near the town of Bailey, N. C., and into violent collision against the overpass bridge carrying the railroad track of this plaintiff over the said highway, and the defendant thereby caused such injury and damage to the said structure as to dislocate the same and the track thereon to such an extent and in such manner that, shortly thereafter, plaintiff's train, which was being properly operated along said track and was proceeding thereon and over the said structure, was by defendant's said negligence directly and proximately caused to be derailed and great injury and damage was done thereto, as will hereinafter more fully appear." (R. 1)[1]

This allegation was denied by defendant, Davis Frozen Foods, Inc., herein the petitioner, in its answer. (R. 2.)

In its further answer and defense, the defendant pleaded contributory negligence on the part of the plaintiff in that

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[1] References are to Printed Transcript of Record (Appendix to Brief of Appellant) United States Court of Appeals.

said overpass bridge was negligently constructed and maintained, and that the plaintiff negligently failed to mark the overhead clearance and negligently failed to provide any warning to travelers approaching said overpass bridge on North Carolina Highway No. 581.

On the first trial of this case, the jury returned a verdict in favor of the defendant by answering the first issue as to negligence, which read: "Was the damage sustained by the plaintiff caused by the negligence of the defendant?" in the negative. Motion by plaintiff to set aside the verdict, supported by oral argument, was denied. (Original judgment, U. S. District Court, November 1, 1951, certified typewritten record, p. 39).

Plaintiff appealed and the United States Court of Appeals, Fourth Circuit, reversed the judgment and remanded the case for a new trial. *Norfolk Southern Railway Company* v. *Davis Frozen Foods, Inc.*, C.A. (4 Cir.), 195 F. 2d 662, stating the following at page 664:

> "The questions really before us are (1) whether it was error to refuse to direct a verdict on the first issue as interpreted by the judge's charge, (2) whether it was error to submit the second and third issues, and (3) whether evidence as to warning signs placed at other underpasses beneath plaintiff's tracks was properly admitted.
>
> On the first question we think that there was error in not directing a verdict for the plaintiff upon the first issue, as we are of the opinion that the evidence so clearly established that the dislocation of the tracks was due to negligence on the part of the driver of the truck that reasonable men could entertain no doubt about the matter."

This petitioner then submitted a petition to rehear, citing as error the holding that the Trial Court should have directed a verdict for the plaintiff on the first issue. Petition was denied by the United States Court of Appeals. (R.)

On the second trial, the District Court directed the jury to answer the first issue, which was the same as in the first trial, "Yes" in favor of the plaintiff (R. 127-128), which the jury did. The jury then answered all other issues in favor of the plaintiff, awarding damages in the amount of $26,250.00. (R. 152.)

The facts are as follows :

The main line of plaintiff runs approximately east and west through the town of Bailey, within which Highway No. 581 passes under the main line of plaintiff by means of an underpass. The bridge which carried the main line of plaintiff over the highway was maintained by plaintiff. The vertical clearance from the top of the highway to the underneath part of the railroad bridge was 9.1 feet. The horizontal clearance was 17.9 feet. (R. 3-4.)

On July 30, 1947, the defendant's truck was traveling northwardly on Highway No. 581 at the speed of 15 m.p.h., having just made a right angle turn with Highway No. 581, some 250 feet from the underpass. The direction traveled by the defendant's driver was slightly down grade. Just before reaching the underpass, the driver realized that the truck couldn't get under and applied his brakes and just before coming to a complete stop, the top of his truck struck a steel I beam of the trestle. The height of the truck was 9½ feet. No injury was sustained by the driver, who got out on the running board of his truck in order to look up at the railroad trestle to observe any damage that might have been caused, and seeing nothing wrong, he backed away and came on to Raleigh. (R. 111-112.)

The top of the truck struck the lowest part of a steel I beam which was 18 inches in height and 22 feet in length, weighed approximately 2,040 pounds, and was placed along side of and secured to two other identical I beams, forming a cluster of three I beams on one side of underpass, and the same for the other side. (R. 51-52.)

There were no warning signs of any kind placed on or about the trestle by the plaintiff which would caution users

of the highway of the dangers of the low underpass. (R. 56, 126.)

The legal limit of the height for trucks in North Carolina is 12½ feet. North Carolina General Statutes, 1943, Vol. 1, Section 20-116(c). (Appendix B of this petition.)

There was a State Highway Department sign some distance from the underpass on the right side of the road, which was obscured by weeds, and which read "Narrow Underpass, Clearance 8½ feet". (R. 73, 74, 75.)

The entire underpass had been re-built just three weeks before by the plaintiff, (R. 55), in such a way that the superstructure was all one unit so that if one part was moved, the other part would move. (R. 52.)

Shortly after the defendant's truck had left, *but before the train wreck,* two disinterested witnesses, responsible citizens of the town of Bailey, walked down to the underpass for the express purpose of seeing if any damage had been done to the trestle. Going underneath the underpass, and looking directly up at the steel beams, they were unable to detect anything wrong with the bridge or I beams, and so left without making any report to the plaintiff's station agent at Bailey. (R. 47, 48, 87, 88.) This was in sharp conflict with the plaintiff's witness, General Superintendent Kennedy, who testified on cross-examination that a man of reasonable judgment about bridge construction should have been able to detect the alleged displacement caused by the truck by walking under the trestle and looking up, *before the train wreck.* (R. 60-61.) Kennedy did not view the scene until *after* the train wreck, (R. 58.) which had materially damaged the trestle. (R. 53.)

The testimony of the two disinterested witnesses mentioned in the preceding paragraph, and that of the defendant's truck driver, that there was no damage done to the trestle, was in sharp contradiction of testimony of plaintiff's brakeman. About an hour afterward, one of plaintiff's trains, traveling westwardly, derailed at or about the underpass. The brakeman in the engine cab first noticed from about 400 feet that the *trestle* or *bridge* was out of

line two feet. (R. 17, 25.) Plaintiff contended and offered evidence tending to show that the brakes were immediately applied and everything possible was done to stop the train, without success.

The respondent defendant appealed, citing as error among other things, the directed instruction by the District Judge on the first issue, which was clearly contrary to the decisions of the Supreme Court of North Carolina which prohibit a directed verdict in favor of the party having the burden of proof.

The United States Court of Appeals affirmed the judgment of the District Court on May 28, 1953.

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals erred:

1. In refusing to apply the law of the State of North Carolina, as repeatedly decided by its highest Court, which holds that a directed instruction in favor of the party having the burden of proof is forbidden. *McCracken* v. *Clark* (1952) 235 N.C. 186, 69 S.E. 2d 184,

2. In holding that the question is one of Federal and not State practice, which is clearly contradictory to the decision of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, and other recent decisions of this Court, as well as those of the various Courts of Appeal,

3. In discriminating against citizens of the State of North Carolina in favor of those authorized to invoke the diversity jurisdiction of Federal Courts,

4. In affirming the judgment of the District Court.[2]

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[2] Other errors to be urged should certiorari be granted concern:

A. The invasion of the province of the jury by the District Court and the United States Court of Appeals on such matters involving actionable negligence, conflicting evidence, foreseeability, and credibility of witnesses. The laws of the State of North Carolina declare these matters to be for the jury.

REASONS FOR GRANTING WRIT

The theory of the plaintiff's case throughout has been that defendant's truck violently struck the underneath part of the plaintiff's overhead train trestle with such force that it dislocated the bridge thereby causing a train wreck about an hour later. The petitioning defendant not only denied this, but developed the plaintiff's evidence and offered its own to prove that it did no damage to the trestle, and showed that under the circumstances of the situation, there was no negligence on the part of the defendant's driver in striking the low, unmarked bridge over the highway. The jury of twelve reasonable men in the first case in the United States District Court of North Carolina believed this, and found for the petitioning defendant. Upon a new trial granted by the Court of Appeals, the District Court was virtually ordered to instruct the jury to find for the plaintiff on the first issue, which read as follows: "Was the damage sustained by the plaintiff caused by the negligence of the defendant?" The District Court instructed the jury to find for the plaintiff on the first issue. (R. 127-128.) Petitioning defendant excepted to this instruction, the jury returned a verdict of $26,250 in favor of the plaintiff, and the United States Court of Appeals for the Fourth Circuit affirmed the District Court.

This petitioner contends that it was error to instruct the jury in favor of the plaintiff on the first issue, the plaintiff having the burden of proof. This is error because it is clearly contrary to the decision of the highest Court of the State of North Carolina. The most recent expression of this local law is found in *McCracken* v. *Clark,* (1952) 235 N.C. 186, 69 S.E. 2d 184, which states in clear and unequivocal terms:

B. A mis-interpretation of the trial judges' charge to the jury on the first issue in the first trial and erroneous interpretation of evidence adduced at the second trial by The Court of Appeals.

"It is established by many authoritative decisions in this Court that a directed instruction in favor of the party having the burden of proof is forbidden. *Haywood* v. *Ins. Co.*, 218 N.C. 736, 12 S.E. 221, and cases cited."

In *Haywood* v. *Ins. Co.*, (1940) 218 N.C. 736, 12 S.E. 221, the Court held:

"A familiar principle of practice forbids a directed instruction in favor of the party upon whom rests the burden of proof. *Yarn Mills* v. *Armstrong*, 191 N.C. 125, 131 S.E. 416; *Evans* v. *Ins. Co.*, 213 N.C. 539, 196 S.E. 814; *House* v. *R. R.*, 131 N.C. 103, 42 S.E. 533; *Cox* v. *R. R.*, 123 N.C. 604, 31 S.E. 848."

The laws of North Carolina regard the proper placing of the burden of proof as a substantial right. *Arnold* v. *Trust Co.*, 48 N.C. 433, 67 A.D. 250; *Fisher* v. *Jackson*, 216 N.C. 302, 4 S.E. 2d 847.

In *Cox* v. *R. R.*, 123 N.C. 604, 31 S.E. 848, the Court discussed this problem in the following way, which is the law of North Carolina today:

"It is the settled rule of this Court that a verdict can never be directed in favor of the party upon whom rests the burden of proof, who in all cases is considered to have the affirmative of the issue, whatever may be its form. Though this rule was discussed and reaffirmed in *Spruill* v. *Ins. Co.*, 120 N.C. 141, it did not have its origin in that case, but in *Wittkowski* v. *Wasson*, 71 N.C. 451, where the doctrine was distinctly laid down in the following words quoted from the opinion of Welles, J., in the Court of Exchequer Chamber: 'There is in every case a preliminary question which is one of law, viz: whether there is any evidence on which the jury could properly find the question *for* the party on whom the *burden* of proof lies. If there is not, the Judge ought to withdraw the question from the jury and direct a *nonsuit* if the *onus* is on the *plaintiff*, or direct a *verdict* for the plaintiff if the *onus* is on the *defendant*.' In other words, the verdict must in either event be directed *against* the party on whom

lies the *onus*, and by necessary implication, can never be directed in his favor.

"In *Spruill* v. *Ins. Co.*, supra, on page 147, this Court has said: 'That where there is no evidence, or a mere scintilla of evidence (or the evidence is not sufficient in a just and reasonable view of it to warrant an inference of any fact in issue), the Court should not leave the issue to be passed upon by the jury, but should direct a verdict *against the party upon whom the burden of proof rests.*' The words in brackets have been cited as authorizing the Court below to pass upon the entire evidence, and direct a general verdict in favor of the defendant upon the contributory negligence of the plaintiff. That opinion will bear no such construction, as the burden of proving contributory negligence is always upon the defendant. Therefore, a direction in his favor, based in any degree upon the contributory negligence of the plaintiff, would be a direction *in favor* of the party upon whom rested the burden of proof, which is directly opposed to the uniform current of our decisions. *Hardison* v. *R. R.*, 120 N.C. 492; *Collins* v. *Swanson*, supra; *Bank* v. *School Com.*, 121 N.C. 107; *Eller* v. *Church*, supra; *Caldwell* v. *Wilson*, 121 N.C. 425; *White* v. *R. R.*, ibid., 484; *Everett* v. *Receivers*, ibid., 519; *Cable* v. *R. R.*, 122 N.C. 892; *Johnson* v. *R. R.*, ibid., 955; *Whitley* v. *R. R.*, ibid. 987."

The plaintiff obviously had the burden of proof on the first issue, which read: "Was the damage sustained by the plaintiff caused by the negligence of the defendant?"

It was also error to direct a verdict in favor of the plaintiff where there was a sharp contradiction in the evidence. There were four witnesses who saw the trestle after the truck struck it, but before the train wreck. Three of them inspected the trestle at close range for the express purpose of ascertaining any damage, and found none. The fourth, plaintiff's brakeman, testified that he noticed the bridge two feet out of line as he approached in the train that wrecked.

The Court of Appeals has not only approved the direction of a verdict on the issue of negligence in this case in

favor of the party having the burden of proof, contrary to the law of the State of North Carolina, but it has done so in utter disregard of plenary evidence in the record tending to show (1) that the defendant's truck did no damage to the trestle, and (2) that the conduct of defendant's driver under the circumstances which existed at the time and place in question was that of a reasonably prudent man; and therefore there was an absence of actionable negligence on the part of the defendant.

U.S.C.A., Title 28, Section 725 (now Section 1652), contains the following language:

> "The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

Beginning with *Swift* v. *Tyson*, 16 Pet. 1, 18, 10 L. Ed. 865, 871, the Court held that the foregoing section applied only to statutes of the state, but that a Federal Court sitting in a state was at liberty to investigate and determine the common law for itself. This rule prevailed for many years, until this Court in *Erie Railroad Company* v. *Tompkins*, (1938), 304 U.S. 64, 82 L. Ed. 1188, 114 A.L.R. 1487, reversed the *Swift* v. *Tyson* doctrine and declared that there was no general common law of the Federal Courts, but that the common law of the state should be applied.

The purpose of the Act quoted above, U.S.C.A., Title 28, 725, is to avoid the maintenance within one state of two divergent or conflicting systems of law, one to be applied in state Courts and the other in Federal Courts, in the case of diversity of citizenship. *West* v. *American Telephone & Tel. Co.*, 311 U.S. 223, 61 S. Ct. 179, 85 L. Ed. 139.

And so, it is well settled that a United States District Court, whose jurisdiction is based on diversity of citizenship, must enforce and apply state law and state decisions

when the rights of individuals arising under ordinary circumstances, not calling for the interpretation of Federal laws, are being determined. As to such transactions, there is no Federal common law. Yankwich, J. "Chief Characteristics of Federal Trial Practices in Civil Cases", (1952), 12 F.R.D. 269, p. 308.

For the purposes of diversity jurisdiction, a Federal Court is in effect only another Court of the state. *Guaranty Trust Co.* v. *York,* 326 U.S. 99; 89 L. Ed. 2079, 65 S. Ct. 1464, 160 A.L.R. 1231. *Angel* v. *Bullington,* 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832.

This rule has been applied by this Court in cases involving burden of proof (*Cities Serv. Oil Co.* v. *Dunlap,* 308 U.S. 208, 84 L. Ed. 196, 60 S. Ct. 201; cf. *Stoner* v. *New York L. Ins. Co.,* 311 U.S. 464, 85 L. Ed. 284, 61 S. Ct. 336); contributory negligence (*Palmer* v. *Hoffman,* 318 U.S. 109, 117, 87 L. Ed. 645, 651, 63 S. Ct. 477, 144 A.L.R. 719); conflict of laws (*Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U.S. 487, 85 L. Ed. 1481, 61 S. Ct. 1023, 134 A.L.R. 1462); accrual of the cause of action (*West* v. *American Teleph. & Teleg. Co.,* 311 U.S. 223, 85 L. Ed. 139, 61 S. Ct. 179, 132 A.L.R. 956); res judicata (*Angel* v. *Bullington,* supra); a state law barring foreign corporations from maintaining suit in state Court (*Woods* v. *Interstate Realty Co.,* 1949, 337 U.S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524; and a state statute requiring a plaintiff to give security in a stockholder's derivative suit (*Cohen* v. *Beneficial Loan Corp.,* 1949, 337 U.S. 541, 69 S. Ct. 122).

In the instant case, the Court of Appeals treated the point of directed verdict with the following language: (R. 14; Appendix A, this petition, p. 22)

> "Defendant argues that verdict should not have been directed for plaintiff on this issue because the burden rested upon the plaintiff to establish defendant's negligence. This question was decided on the former appeal, where we said: The fact that the burden of this issue rested upon the plaintiff is imma-

terial; for the rule is well settled that the Court, upon request, should direct a verdict in favor of the party having the burden of proof if the evidence establishes the facts in his favor so clearly that reasonable men could entertain no doubt with regard thereto. (Citing cases). Defendant argues that the state rule is to the contrary; but, that the question is one of Federal and not of state practice, is too well settled to admit of argument, and this was true even in the days of the Conformity Act. See *Nudd* v. *Burrows*, 91 U. S. 426, 442; *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13-14; *Herron* v. *Southern Pac. R. Co.*, 283 U.S. 91, 94."

It is of paramount importance to note the cases quoted by the United States Court of Appeals in support of its position. It is sufficient to say that all of these cases, *Nudd* v. *Burrows*, 1875, 91 U. S. 426, *Capital Traction Co.* v. *Hof*, 1898, 174 U.S. 1, and *Herron* v. *Southern Pac. R. Co.*, 1930, 283 U.S. 91, pre-date the rule laid down by *Erie R. Co.* v. *Tompkins* (supra). The *Erie* case has shattered the theory propounded by Chief Justice Hughes in *Herron* v. *Southern Pac. R. Co.* (supra) and relied upon by Judge Parker in the Court of Appeals, that Federal Courts and state Courts sit as coordinate tribunals with no common superior in litigation between citizens of different states and that they are free to declare the unwritten law as they respectively deem best.[3] The Federal Rules of Civil Procedure have abrogated most, if not all, of the Conformity Act. For an interesting discussion of the effect of the *Erie* case on *Herron* v. *Southern Pac. R. Co.* (supra), see an article by Professor Edmund P. Morgan "Choice of Law Governing Proof", Harvard Law Rev., Vol. LVIII, No. 2, p. 172, et seq., 1944.

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[3] In *Herron* v. *Southern Pac. R. Co.*, 283 U.S. 91 (1931), Chief Justice Hughes speaking for a unanimous Court said:

"The controlling principle governing the decision of the present question is that state laws cannot alter the essential character

A further distinction, which is not necessary, of the cases cited by the United States Court of Appeals to support its position may be noted in the fact that the *Nudd* case involved a Federal Bankruptcy Act, the jurisdiction in the *Capital Traction* case was based upon an interpretation of an Act of Congress, and in the *Herron* case, the point was whether the Federal District Judge could direct a verdict *for the defendant* in a personal injury action when it appeared as a matter of law that the plaintiff was guilty of contributory negligence (notwithstanding a state constitutional prohibition). In the *Herron* case, the verdict was directed at the close of plaintiff's testimony, thus *against* the plaintiff, and obviously on the first issue. This is in accord with North Carolina decisions which hold at the close of plaintiff's case, when the evidence taken in the light most favorable to the plaintiff is susceptible of but one conclusion that the plaintiff's negligence contributed to his injury, the case must be dismissed as of non-suit.

None of the above cases is hardly in point, had the *Erie* case never been decided.[4]

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or function of a Federal Court. The function of a trial judge in a Federal Court is not in any sense a local matter, and state statutes which interfere with the appropriate performance of that function are not binding upon the Federal Court under either the Conformity Act or the 'Rules of Decision Act'." The *Herron* Case cites the *Nudd* v. *Burrows,* (supra) and *Capital Traction Co.* v. *Hof,* (supra) cases.

[4] It is to be noted that the Supreme Court in the *Erie* Case recognized an article of Judge Parker, "The Federal Jurisdiction and Recent Attacks Upon It" (1932) 18 A.B.A.J. 433, 438 as defending the old *Swift* v. *Tyson* doctrine. *Erie R. Co.* v. *Tompkins,* 82 L. Ed. 1188, p. 1194, Footnote 22.

Judge Parker reviews the situation again in 1949, in "Erie v. Tompkins in Retrospect", American Bar Assoc. Journal, Vol. 35, P. 19 at p. 85, wherein he champions his position with the following: "I do not think, however, that when the point is square-

The last opinion of the Court of Appeals, in this case, quotes from its first opinion and refers to cases reported there without citing them. These cases are listed as follows:

1930 *Gunning* v. *Cooley*, 281 U.S. 90
1912 *Slocum* v. *N. Y. Life Ins. Co.*, 228 U.S. 364
1887 *North Penn R. Co.* v. *Com. Nat. Bank*, 123 U.S. 727
1885 *Marshall* v. *Hubbard*, 117 U.S. 415
1877 *County of Macon* v. *Shores*, 97 U.S. 272, 278
1924 *Angelo* v. *Lamborn*, 4 Cir. 2 F. 2d 855

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ly presented the Supreme Court will ever hold that the Federal Courts must follow state decisions with respect to directing a verdict. Not only would such a holding be directly in the teeth of prior holdings of the Court, but it would violate the principle that the exercise of the judicial function is a matter for Federal Courts themselves. Whether facts constitute a cause of action is a question of local law; but whether, in determining whether such facts have been proven, the judge shall pass upon the question himself on the theory that the evidence is so clear that reasonable men could not doubt what the facts are, or should submit it to the jury for their determination, is so clearly a matter of the exercise of the judicial function as hardly to admit of argument."

The above reasoning employed by Judge Parker for his position is worthy of consideration as it relates to the direction of a verdict *AGAINST* the party having the burden of proof or *AGAINST* the plaintiff. The trial judge in such an instance is utilizing the identical power vested in him to determine whether the facts adduced by the party having the burden of proof are sufficient to be submitted to the jury. In North Carolina, as in other jurisdictions, the action of the trial judge in thus dismissing the plaintiff's case is termed a nonsuit or dismissal under the statute (Hinsdale Act): "The Court does not weigh the evidence, but assumes it to be true in favor of the defeated party." MacIntosh, "North Carolina Practice and Procedure", 1929, p. 633, citing *In Re Will of Margaret Deyton*, 177 N. C. 494, 99 S.E. 424. There is a vast distinction in North Carolina between directing a verdict *against* the party having the burden of proof and directing one *for* the party having the burden. The latter is strictly prohibited, for it is the province of the jury to pass upon the weight of the evidence.

1926 *N. Jacobi Hardware Co.* v. *Vietor,* 4 Cir. 11 F. 2d 30
1928 *Lyon* v. *Travelers Protective Ass'n,* 4 Cir. 25 F. 2d 596, 597
1948 *United States* v. *Grannis,* 4 Cir. 172 F. 2d 507, 513

Again it is to be noted that all are prior to the *Erie* case, with the one exception of *U. S.* v. *Grannis,* 1948, 4 Cir., 172 F. 2d 507. The latter case is irrelevant because it was not a case based on diversity of citizenship, but involved the violation of a Federal criminal statute.

Manifestly Judge Parker cannot bottom his position upon the dichotomy of substance and procedure. "Such abstractions" should be put aside for the "nub of the policy", that the accident of citizenship "should not lead to a substantially different result in a state Court and in a Federal Court." *Guaranty Trust Co.* v. *York,* (supra).

Touching upon the capstone of this petition is an article by Judge Charles E. Clark of the Second Circuit, "State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins", Yale Law Journal, Vol. 55, No. 2, p. 267 (1946). Judge Clark agrees with Professor Morgan that the state law should control in the direction of verdicts. At page 289, he states:

> "But if the burden of proof and presumptions are to be governed by state law in diversity cases, then it rather logically follows that rule as to the direction of a verdict, taking a case from the jury, and even the so carefully cherished right of "comment" on the evidence may be either lost or greatly limited by such law. Though there are cases to the contrary, Professor Morgan in a recent acute article already cited with favor by the Supreme Court, has suggested with considerable force the application of state rules as to discovery of a 'jury question', that is, as to direction of a verdict or nonsuit."[5]

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[5] Professor Morgan's article is the same referred to on page 13. Among the cases to the contrary that Judge Clark cites are two of Judge Parker's Fourth Circuit cases; *Gorham* v. *Mutual*

Summarizing, the reasonings relied upon for allowance of the writ are:

(1) The United States Court of Appeals has decided an important question of a local nature in a way which is in direct conflict with applicable local decisions, in that it has decided that an instructed or directed verdict *in favor* of the party having the burden of proof is permissible in a Federal Court, contrary to the well established law of the decisions of the Supreme Court of the State of North Carolina which hold that such an instruction is forbidden. *McCracken* v. *Clark*, (supra).

Ben. Health & Accident Ass'n of Omaha, 144 F. 2d 97, 99, (1940) Cert. denied 312 U.S. 688 (1941) and *McSweeney* v. *Prudential Ins. Co. of America*, 128 F. 2d 660 (1942) Cert. denied 317 U.S. 658 (1942). Briefs for respondents in opposition to both of these petitions forcefully showed that there was no conflict between the decision of the Court of Appeals and the local state law. Referring to these opinions in footnote 103 of his article, Judge Clark says "This, of course, was the former view. *Herron* v. *Southern Pac. R. Co.* 283 U.S. 91 (1931)". For further treatment of these two cases, see pages 174-175 of Professor Morgan's article (supra) where he states: "There is nothing to show that the attention of the Fourth Circuit was called to the *Stoner* decision. In other Circuits, that decision has been accepted as requiring a Federal District Court to submit an issue to the jury on evidence which would take it to the jury in the Courts of the state in which the Federal Court is sitting." The cases Professor Morgan refers to are: *Laxton* v. *Hatzel and Buehler Inc.*, 142 F. 2d 913 (C.A. 6, 1944) and *Waldron* v. *Aetna Casualty and Surety Co.*, 141 F. 2d 230 (C.A. 3d, 1944).

Also holding that the direction of verdicts should be governed by the substantive law of the State are: *White* v. *State of Maryland*, 106 F. 2d 392, C.A. 4th; *Clay County Cotton* v. *Home Life Ins. Co.*, 113 F. 2d 856 (C.A. 8th, 1940); *Lennig* v. *New York Life Ins. Co.*, 122 F. 2d 871 (C.A. 3d, 1941); *Cooper* v. *Brown*, 126 F. 2d 874 (C.A. 3d 1942); *Detroit Edison Co.* v. *Knowles*, 152 F. 2d 422, (C.A. 6th, 1945); *Gulf, Mobile & Ohio R. Co.* v. *Williamson*, 191 F. 2d 887 (C.A. 8th, 1952).

(2) The United States Court of Appeals has decided, in a diversity of citizenship case, an important question of a local nature in conflict with applicable decisions of this Court. *Erie R. Co.* v. *Tompkins,* (supra), *Angel* v. *Bullington,* (supra), *Guaranty Trust Co.* v. *York,* (supra), *Cities Service Oil Company* v. *Dunlap* (supra), *Palmer* v. *Hoffman* (supra), *Klaxton Company* v. *Stentor Electric Mfg. Co.* (supra), *Woods* v. *Interstate Realty Company* (supra), *Cohen* v. *Beneficial Industrial Loan Corp.,* (supra).

(3) The obvious result of the decision of the United States Court of Appeals is to give a litigant an advantage in the Federal Court, which he would not have in the Courts of the State of North Carolina. A litigant filing suit in a Federal Court may escape local prejudice, but he should not be allowed to take refuge therein from the laws, statutes, decisions and public policy of the state. Since the cause of action relied upon by the plaintiff is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the Federal Court as in the State Court. Where local law qualifies or abridges the rights of litigants, the Federal Court must follow suit. Otherwise, there is a different measure of the cause of action in one Court than in another, and the principle of *Erie R. Co.* v. *Tompkins* (supra) is transgressed. *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 93 L. Ed. 1520, 69 S. Ct. 1233. The result of the decision by the United States Court of Appeals will invite litigants, who have a choice, to bring their action in the Federal Court and thus avoid the reasonable burden placed upon them by the law of the State of North Carolina, which prohibits a directed verdict in favor of the party having the burden of proof. This is clearly a discrimination against citizens of this state in favor of those authorized to invoke the diversity jurisdiction of Federal Courts.

(4) If the decision of the United States Court of Appeals is allowed to stand, mischievous results will develop within this state, and its citizens will be denied the equal protection of the law.

CONCLUSION

For the foregoing reasons, we respectfully submit that this is an appropriate case for the granting of a Writ of Certiorari. The question involved is one of great public importance to the people of the State of North Carolina. There are other states whose public policy forbids the direction of a verdict *in favor* of the party having the burden of proof.[6] The conflict between the opinion of the United States Court of Appeals for the Fourth Circuit and the decision of this Court, commencing with the *Erie* case, and the conflict with the well determined decisions of the Supreme Court of the State of North Carolina culminating in the case of *McCracken* v. *Clark*, (1952), 235 N.C. 186, 69 S.E. 2d 184, will bring about confusion and injustice. We submit that the Writ should be granted as prayed for, and that judgment of the United States Court of Appeals, Fourth Circuit, and the District Judge be reversed.

Respectfully submitted,

MURRAY ALLEN

ARCHIBALD CRAIGE

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Counsel for Petitioner

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[6] *Spence* v. *Bethlehem Steel Co.*, 173 Maryland 539, 197 A. 302, p. 308; *Whitten* v. *City of Haverhill*, 204 Mass. 95, 90 N.E. 409.

APPENDIX "A"

OPINION OF THE COURT

No. 6555

DAVIS FROZEN FOODS, INCORPORATED, *Appellant*

v.

NORFOLK SOUTHERN RAILWAY COMPANY, *Appellee*

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges

PARKER, Chief Judge:

This is the second appeal in the action brought by the Norfolk Southern Railway Company to recover damages sustained as the result of a truck's colliding with a trestle bridging the underpass of a state highway at Bailey, North Carolina, and dislocating plaintiff's railroad track and thereby causing the wreck of one of its freight trains. On the former appeal we held that there was error in not directing a verdict for plaintiff on the issue as to whether the dislocation of the track was caused by the negligence of the driver of the truck but that there was evidence for the consideration of the jury on issues directed to the contributory negligence of plaintiff in failing to maintain adequate warning signs and in failing to operate its train so as to avoid the wreck. Norfolk Southern Ry. Co. v. Davis Frozen Foods 4 Cir. 195 F. 2d 662. On the new trial had in accordance with our mandate, the trial judge directed a verdict in favor of plaintiff on the issue relating to the negligence of defendant in causing the dislocation of the track, and the jury, in answer to specific issues submitted to them, exonerated the plaintiff of negligence with respect to the maintenance of warning signs and the operation of its train. From a judgment on the verdict, which awarded damages to plaintiff, the defendant has appealed.

Defendant's principal contention is that there was error on the part of the trial court in directing verdict for plaintiff on the issue as to whether the damage sustained by plaintiff was caused by negligence of the defendant. This issue was limited by the trial judge in his charge upon the second trial, just as it was limited in the first, to the question as to whether the dislocation of plaintiff's track was

caused by the negligence of the driver of defendant's truck; and as there was no substantial difference in the evidence bearing upon the issue in the two trials, it was the duty of the judge, in application of the law of the case, to direct a verdict for plaintiff, since we had held that it was error not to direct a verdict for plaintiff, on such evidence in the first trial. Thompson v. Maxwell Land Grant Co. 168 U.S. 451, 456; A. C. L. R. Co. v. Chance 4 Cir. 198 F. 2d 549, cert. den. 344 U.S. 877; Wyant v. U. S. Fidelity & Guaranty Co. 4 Cir. 116 F. 2d 83, cert. den. 314 U. S. 610; Maryland Casualty Co. v. City of South Norfolk 4 Cir. 54 F. 2d 1032, cert. den. 286 U. S. 562; Dodd v. Union Indemnity Co. 4 Cir. 32 F. 2d 512.

Defendant argues that there was a difference in the testimony on the two trials; but we think that there was no substantial difference. The driver of the truck softened somewhat his testimony to the effect that he was not thinking when he ran his truck against the trestle; but he admitted that he was familiar with the underpass and did not "realize" that he was driving a larger truck than he was accustomed to driving until too late to avoid running against the trestle. That such inattention to what he was doing was negligence is too clear for argument. The witness Stone, who did not testify on the first trial, gave evidence that the engine turned over after it had crossed the trestle, and that the cars seemed to go down in a hole; but there was nothing in this to negative the fact that the derailment occurred as established by the evidence on the first trial, and the witness admitted that what he saw might have resulted from the engine and cars getting off the track as they crossed the trestle. The witness Warrenfels testified on the second trial that a sudden change of temperature might cause the buckling of rails, if there was no proper chine left between their ends; but there was no evidence of any sudden change of temperature or anything else, other than the collision of the truck with the trestle, to explain the dislocation of the track.

Defendant relies, as it did on the first appeal, upon the testimony of the driver of the truck and of two other witnesses to the effect that they looked up after the collision and saw nothing wrong with the trestle. None of these witnesses, however, examined the trestle from the top where the tracks were and where the dislocation would have been evident, and all admitted that their examination was of the

most casual nature. Their testimony can hardly be said to constitute a "scintilla" of evidence that the collision did not cause the dislocation of the track which resulted in the wrecking of the train. The evidence establishes that the track was in good condition and that a train passed safely over it about an hour before the collision. The collision was a violent one, as the crumpled condition of the top of the truck establishes beyond peradventure. About an hour later the track was seen to be out of line by a trainman on an approaching train, who leaped from the train for safety to avoid being in the wreck which he saw was inevitable. The track was out of line just as though it had been shoved over by the collision and, although the matter was carefully investigated by both parties, nothing was found except the collision to account for the dislocation. The suggestion that heat expansion may have caused the buckling of the rails is too far fetched for serious consideration. As we pointed out in our former opinion, it is too much of a coincidence that heat buckling should have occurred at the one place on a 300 mile line of railroad where the collision with the truck had just taken place, and this too at 10:30 in the morning. Defendant attempts to argue that the rails may have been relaid without sufficient chine when the bridge was repaired some weeks before; but the evidence is that the rails were not disturbed when the repairs were made. The evidence leaves no ground for reasonable men to differ as to the fact that the collision was due to the negligence of the driver of the truck and that it resulted in knocking the tract out of alignment. Any other conclusion would be entirely without support in the evidence and would be based on conjecture so tenuous that it could not reasonable be indulged. Under such circumstances verdict for the plaintiff on this issue was properly directed.

Defendant argues that verdict should not have been directed for plaintiff on this issue because the burden rested upon the plaintiff to establish defendant's negligence. This question was decided on the former appeal, where we said: "The fact that the burden of this issue rested upon the plaintiff is immaterial; for the rule is well settled that the court, upon request, should direct a verdict in favor of the party having the burden of proof if the evidence establishes the facts in his favor so clearly that reasonable men could entertain no doubt with regard thereto. (Citing cases)." Defendant argues that the state rule is to the contrary; but

that the question is one of federal and not of state practice, is too well settled to admit of argument, and this was true even in the days of the Conformity Act. See Nudd v. Burrows 91 U. S. 426, 442; Capital Traction Co. v. Hof 174 U.S. 1, 13-14; Herron v. Southern Pac. R. Co. 283 U.S. 91, 94.

Defendant argues that verdict should have been directed in its favor on the issue of contributory negligence because of the evidence relating to the inadequacy of the warning signs displayed. There was a conflict in the evidence as to the adequacy of the signs, however, and quite apart from this, the jury might well have found that any negligence with respect thereto could not be held a contributory cause of the collision, since the driver of the truck was thoroughly familiar with the underpass. On the former appeal we held that the question was one for the jury, saying "The crossing above the level of the highway was for the benefit of the railroad as well as of the public; and, if there was danger to the public in its maintenance, the railroad as the owner in charge of the property, the presence of which constituted the danger, was under obligation to see that due warning thereof was given. See Contino v. Baltimore & Annapolis R. Co. 4 Cir. 178 F. 2d 521; Id. 4 Cir. 185 F. 2d 932. Whether the warning sign put up by the Highway Commission and partially obscured by weeds was a sufficient discharge of the duty was a question for the jury, as was also the question as to whether the negligence, if it existed, was a contributory cause of the collision".

There was no error and the judgment appealed from will be affirmed.

Affirmed.

APPENDIX "B"

North Carolina General Statute, 1943 Vol. 1, Section 20-116 (c)

20-116, *Size of Vehicles and loads*

(c) No vehicle unladen or with load shall exceed a height of twelve feet, six inches.